

SERVED: February 27, 2006

NTSB Order No. EA-5211

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 24<sup>th</sup> day of February, 2006

_____	)	
APPLICATION OF	)	
	)	
GUS GEORGE YIALAMAS	)	
	)	Docket 313-EAJA-SE-16494
	)	
For an award of attorney	)	
fees and expenses under the	)	
Equal Access to Justice Act	)	
	)	
_____	)	

**OPINION AND ORDER**

Applicant has appealed from the Equal Access to Justice Act (EAJA) initial decision of Chief Administrative Law Judge William E. Fowler, Jr., served on January 7, 2005.<sup>1</sup> The law judge denied applicant's EAJA application. Applicant has appealed that decision, and argues that the Administrator's complaint against applicant was not substantially justified, and

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<sup>1</sup> A copy of the law judge's initial decision is attached.

that awarding attorney's fees under EAJA is consequently appropriate. We grant applicant's appeal.

On June 21, 2001, the Administrator issued an order suspending applicant's commercial pilot certificate. In the order, the Administrator alleged that applicant operated a Seneca, PA-34 aircraft, in spite of the fact that he was aware that an elevator trim cable was damaged, and that applicant failed to have the damage repaired. As a result, the Administrator alleged that applicant had violated 14 C.F.R. §§ 91.7(a), 91.405(a), and 91.13(a).<sup>2</sup>

Upon reviewing the evidence, the law judge granted the Administrator's complaint, concluding that the airplane was unairworthy and that respondent knew it was unsafe. Transcript (Tr.) 388, 390.

Applicant appealed the law judge's decision, arguing that the trim cable system was not required to be airworthy by the certification regulations, and that, even if the aircraft was unairworthy, applicant acted in good faith because no qualified mechanics ever advised him of its unairworthiness. Applicant

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<sup>2</sup> Section 91.7(a) prohibits operating an aircraft unless it is airworthy. Section 91.405(a) requires inspections pursuant to Part 91, Subpart E, and requires that, except with regard to instruments or equipment permitted by § 91.213(d)(2) to be inoperative, discrepancies must be repaired in accordance with Part 43. Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

argued that two mechanics approved the aircraft to return to service. We agreed that applicant acted in good faith in believing that the aircraft was airworthy, and reversed the law judge's decision. Administrator v. Yialamas, NTSB Order No. EA-5111 (2004). Applicant filed a timely application for attorney's fees pursuant to EAJA, which the Administrator disputed. The law judge denied applicant's application, finding that the Administrator was substantially justified in pursuing the charges.

Under EAJA,<sup>3</sup> we will award certain attorney's fees and other specified costs unless the government is shown to have been substantially justified in pursuing its complaint. 5 U.S.C. § 504(a)(1); Application of Smith, NTSB Order No. EA-3648 at 2 (1992). The Supreme Court has defined the term "substantially justified" to mean that the government must show that its position is reasonable in fact and law. Pierce v. Underwood, 487 U.S. 552, 565 (1988); see also Application of U.S. Jet, Inc., NTSB Order No. EA-3817 (1993). Such a determination of reasonableness involves an initial assessment of whether sufficient, reliable evidence exists to pursue the matter. Catskill Airways, Inc., 4 NTSB 799, 800 (1983) (stating that

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<sup>3</sup> Equal Access to Justice Act, 5 U.S.C. § 504; see also 49 C.F.R. pt. 826.

Congress intended EAJA awards to dissuade the government from pursuing "weak or tenuous" cases).

We have previously recognized that EAJA's substantial justification test is less demanding than the Administrator's burden of proof when arguing the merits of the underlying complaint. U.S. Jet, supra, at 1 (citing Administrator v. Pando, NTSB Order No. EA-2868 (1989)). In Federal Election Commission v. Rose, 806 F.2d 1081 (D.C. Cir. 1986), the D.C. Circuit stated that the merits phase of a case is separate and distinct from the EAJA phase. As such, we are compelled to engage in an independent evaluation of the circumstances that led to the Administrator's original complaint, and determine whether the Administrator was substantially justified in pursuing the case based on those circumstances. Id. at 1087.

In this case, it appears that the Administrator never possessed any evidence of unairworthiness, other than opinions from aviation safety inspectors. The Administrator argues that the law judge made a credibility determination in reaching his decision, therefore rendering attorney's fees inappropriate.<sup>4</sup>

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<sup>4</sup> "[W]hen key factual issues hinge on witness credibility, the Administrator is substantially justified - absent some additional dispositive evidence - in proceeding to a hearing where credibility judgments can be made." Application of Fuller, NTSB Order No. EA-5136 at 7 (2005); see also Administrator v. Caruso, NTSB Order No. EA-4165 (1994);

However, we previously determined that the case "[did] not appear to rest on a credibility determination," and that, even if we did resolve all factual disputes in favor of the Administrator, the Administrator "still did not prove the charges against respondent by a preponderance of the evidence." Administrator v. Yialamas, NTSB Order No. EA-5111 at 8 (2004).

The Administrator also argues that 14 C.F.R. § 91.213(d), which allows for operation of an aircraft even if certain non-critical parts of the aircraft are inoperable, does not apply to applicant's operation of the aircraft, because the elevator trim cable was part of the flight controls. Finally, the Administrator argues that her issuance of a ferry permit shortly after the alleged violations cannot excuse applicant's violations.

We have long recognized that an aircraft is considered airworthy only when it: (1) conforms to its type certificate, and (2) is in a condition for safe operation. Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992) (citing Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985)); see also 49 U.S.C. § 44704(d)(1). While we agree with the law judge's conclusion that the issuance of a temporary "ferry" permit would

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(continued)

Administrator v. Conahan, NTSB Order No. EA-4276 (1994);  
Administrator v. Martin, NTSB Order No. EA-4280 (1994).

not excuse a proven violation, we have considered the issuance of a ferry permit to be a chief indicator that the aircraft was in a condition for safe operation. Doppes, 5 NTSB at 53. In the case at hand, the Administrator issued a ferry permit for the aircraft, even though the applicant had not repaired the aircraft's elevator trim cable. The Administrator could not, therefore, argue that the aircraft was not in a condition for safe operation at the time of the alleged violation; as such, the Administrator was not substantially justified in contending that the aircraft was not in a condition for safe operation.

Regarding the issue of whether the aircraft conformed to its type certificate, the Administrator never introduced any information regarding the aircraft's type certificate. Therefore, the Administrator was not substantially justified in arguing that a trim cable is required in order for the aircraft to conform to its type certificate and therefore be considered "airworthy."

The Administrator's response to applicant's EAJA application does not contain any new evidence to show the reasonableness of the Administrator's position that applicant violated §§ 91.7(a), 91.405(a), or 91.13(a) because the trim cable was required in order for the aircraft to be consistent with its type certificate. Instead, the Administrator's

response to the EAJA application merely cites a witness's testimony, wherein the witness opined that the aircraft's type certificate *probably* required an intact elevator trim cable.<sup>5</sup> This testimony does not suffice to prove that the Administrator was substantially justified in charging applicant with violations of §§ 91.7(a), 91.405(a) or 91.13(a). In sum, we find that applicant is entitled to an award of fees under EAJA.

Regarding the amount of the award, the Administrator argues that the attorney's fees that applicant requests, totaling \$20,104.40, are excessive and include fees for other, irrelevant work that applicant's attorney performed. Further, applicant also requests payment for fees incurred as a result of this EAJA appeal, but has not submitted invoices specifying fees for this

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<sup>5</sup> The Administrator cites the testimony of Aviation Safety Inspector Jerry Henninger in support of her argument that the elevator trim cable was required under the aircraft's type certificate, but such testimony is merely speculative:

Well, the elevator trim cable, if it's unairworthy and it's considered the primary trim cable and that primary trim cable is part of the aircraft at type certification, that is required then to be operational to make the aircraft airworthy. So, the aircraft is unairworthy because the cable's unairworthy.

Tr. 170. Later, Inspector Henninger indicated that he was unsure of the requirements of the type certificate:

[Q.] Yeah. This aircraft was certified with or without an autopilot, the original type certificate?

[A.] Without. I would imagine. I'd have to check the type certification.

Tr. 180.

appeal. Therefore, we will require additional documentation to determine the amount of the award.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The law judge's decision is reversed;
2. Applicant is entitled to an award of fees and expenses pursuant to EAJA;
3. Applicant shall submit, within 30 days after the service date indicated on this opinion and order, a new statement of fees and expenses; and
4. The Administrator may reply to applicant's submission within 15 days of the service date of the submission.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.